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**United States v. Cooper: BAIL
REFORM ACT REQUIRES NOTICE
BEFORE PRESCRIBING
MANDATORY ENHANCED
SENTENCE**

In *United States v. Cooper*, 827 F.2d 991 (4th Cir. 1987), the court of appeals held that a person convicted of a crime, while released on bail pending appeal of another crime, may not receive the mandatory enhanced sentence prescribed in 18 U.S.C. § 3147 without first receiving notice of the possibility of such enhanced sentence. Section 3147 of the Bail Reform Act of 1984 (hereinafter the "Act") provides that a person convicted of an offense while released pending appeal of a separate crime receive a mandatory sentence in addition to that prescribed for the substantive offense.

Vernon Cooper was convicted and sentenced in early 1984 for income tax evasion and was released on bail pending appeal. Cooper did not receive notice, that if convicted of an offense while out on bail, he could receive an enhanced sentence. On July 7, 1986, while still released on bail, Cooper was convicted of possession of cocaine and possession of a firearm by a convicted felon. The government sought an enhanced sentence for the 1986 conviction, pursuant to § 3147, which reads:

A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—

- (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a

felony; or

- (2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed under this section shall be consecutive to any other sentence of imprisonment.

18 U.S.C. § 3147 (1984).

The district court, upon motion by Cooper to prohibit the enhancement of penalties, ruled as a matter of statutory construction that § 3147 was inapplicable to Cooper. The court stated that § 3142(h) of the Act requires that notice be given to the releasee, prior to release, of the possibility of sentence enhancement if he is convicted of another crime while on release. Section 3142(h)(2) orders, in part, that the judicial officer authorizing release advise the person being released of "the penalties for violating a condition of release..." 18 U.S.C. § 3142 (h)(2) (1984). The district court based its conclusion on two factors. First, the court held that Congress' silence in the Act on the effect of enhanced penalties upon failure of a judicial officer to give notice of the enhancement provisions indicates that § 3142(h) applied to § 3147. Second, because the Act is penal in nature and is ambiguous as to whether notice of the enhanced penalties is required, the rule of lenity would be applied. *Cooper*, 827 F.2d at 994. Thus, Cooper could not receive the enhanced sentence since he did not receive notice prior to being released.

The Court of Appeals for the Fourth Circuit affirmed. The court based its decision in large part on the grounds of the district court, and found even "stronger evidence" that would lead to the conclusion that "congress did not intend § 3147

to apply when the notice requirements of § 3142 were not fulfilled. *Id.*

The court of appeals examined the legislative history of the Act and found two factors persuasive. First, it found that the Act was based in large part on the then existing District of Columbia Release and Detention Statute, D.C. Code Ann. § 23-1321(c). That statute requires that a judicial officer authorizing release "inform such person of the penalties applicable to violation of the conditions of release," and shall warn him of the enhancement of penalties for conviction of a crime committed while on release. *Id.* However, § 23-1328 (b) of that Act specifically provides that "the giving of a warning to the person released of the penalties imposed by this section shall not be a prerequisite to application of [the enhanced penalties] section." D.C. Code Ann. § 23-1328 (b) (1981). Contrary to this provision, the federal statute omits such language. The court of appeals refused to "presume" that the omission in § 3147 occurred as a result of oversight. *Cooper*, 827 F.2d at 994. Thus, Congress intended that notice of possible enhanced sentence be given, if the releasee is to subsequently receive a greater sentence.

The court concluded that Congress did not intend § 3147 to apply to a case "where the warning was not given and, indeed could not be given because it was not yet a part of the law." *Id.* at 995. Thus, a judicial officer who is authorizing release pending appeal must give the releasee notice that he may receive an enhanced sentence if he is convicted of another crime while released. Unless such notice is given, the person may not receive an enhanced sentence.

—Michael Scott Friedman

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